Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DANIEL RAY WILKES

Petitioner

V.

STATE OF INDIANA,

Respondent

On Petition for a Writ of Certiorari

To the Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Capital Case

1. Whether an ambiguous assertion of one's right to silence during a custodial interrogation is insufficient to terminate the interrogation even though the interrogating officer understood the request to be an assertion of that right?

2. Whether the Indiana death penalty statute violates the *Apprendi/Ring* Doctrine and unconstitutionally permits the court to determine the appropriateness of a sentence of death, life imprisonment, or a term of years?

3. The Indiana Supreme Court determined that the jury's inability to arrive at a unanimous decision with regard to the penalty should have been considered by the court in deciding the appropriate sentence, but this factor was not considered by the trial court; and, therefore, should have the Indiana Supreme Court remanded the case for resentencing?

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The petitioner, Daniel Ray Wilkes, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Indiana Supreme Court.

OPINION BELOW

The opinion of the Indiana Supreme Court appears at Appendix A to the petition, p. 2, and is reported at 917 N.E.2d 675 (Ind. 2010).

JURISDICTION

The judgment of the Indiana Supreme Court was entered on December 10, 2009. The Indiana Supreme Court denied a timely filed petition for rehearing on March 16, 2010. The order denying rehearing appears at Appendix E to the petition, p. 48.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

Fourteenth Amendment, Section 1 to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Burns Ind. Code Ann. § 35-50-2-9 (2000)

Death sentence; life imprisonment without parole

Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is an individual with mental retardation.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Carjacking (IC 35-42-5-2).

(I) Criminal gang activity (IC 35-45-9-3).

(J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the

defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (f) and shall provide a special verdict form for each aggravating circumstance alleged. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) For a defendant sentenced after June 30, 2002, except as provided by IC 35-36-9, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

(1) the death penalty; or

(2) life imprisonment without parole;

only if it makes the findings described in subsection (l). If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. After a court pronounces sentence, a representative of the victim's family and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

(1) sentence the defendant to death; or

(2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (l).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court

may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

(1) conviction or sentence was in violation of the:

(A) Constitution of the State of Indiana; or

(B) Constitution of the United States;

(2) sentencing court was without jurisdiction to impose a sentence; and

(3) sentence:

(A) exceeds the maximum sentence authorized by law; or

(B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) A person who has been sentenced to death and who has completed state post-conviction review proceedings may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt or the appropriateness of

the death sentence if the person serves notice on the attorney general. The supreme court shall determine, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the supreme court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The supreme court may not make a determination in the person's favor nor make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general with an opportunity to be heard on the matter.

(l) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

STATEMENT OF THE CASE

In the spring of 2006, Daniel Wilkes met Donna Claspell and Michael Baker while all three were being treated at a drug rehabilitation center. After discharge, Wilkes stayed with Donna and her two daughters, eight-year-old Sydne Claspell and thirteen-year-old Avery Pike. Wilkes told Baker that one night he awoke to find Avery "hunching on his leg," and that he and Avery then engaged in mutual oral sex. Wilkes later admitted to molesting Avery on a total of three or four occasions. On the evening of April 23 or the early morning of April 24, Donna found Wilkes and Avery together and told Wilkes that he would have to leave the home.

Around eight o'clock the next morning, Donna's neighbors observed Baker picking up Wilkes at the home, and one heard Wilkes say something like, "I've got to get out of here." That night, according to Baker, Wilkes kept looking out the windows and expressed concern that the police would come for him.

On April 26, the bodies of Donna, Sydne, and Avery were found in their home. Donna and Sydne were in the master bedroom. Donna had sustained multiple injuries, including a deep cut wound to the neck and blows to the head from a hammer and another blunt instrument. A knife was found under Donna's shoulder. Sydne had died from at least twenty-seven blows to the head, back, and shoulders from a hammer head and claw. Avery was found in her bedroom naked and face down on the bed. Her hands were bound behind her back with a cord, her ankle was tied to the bedpost, and she had been strangled with a piece of clothing.

Because Baker and Wilkes were seen leaving Donna's residence Monday morning, police sought both for questioning. Baker was at his ex-wife's home Wednesday evening when he saw on television that he was wanted for questioning. Baker called the State Police. Wilkes was located Wednesday evening in Vincennes. Wilkes was arrested on a child support warrant from Pike County, taken to the Vincennes Police Department, and turned over to the Evansville detectives.

Wilkes was initially interrogated in Vincennes. Wilkes was asked what he thought the police found at Donna's house and responded "something bad." Wilkes was told that Donna and her two (2) kids were killed and he responded "Why did I do it? Don't tell me I did it." Wilkes stated that he had vague flashes about seeing Donna on her bed dead. Wilkes agreed when detectives suggested that he had a flash of Avery face-down, leg tied to the bed, hands tied, and something wrapped around her neck. As to Donna, Wilkes said he did it. Wilkes said he tied Avery's hands behind her, choking her with a piece of clothing. Sydne was on the floor and Wilkes hit her like he hit her mother.

Several times during the marathon statement in Vincennes, Wilkes tried to stop the interrogation before having made any admissions. His first attempt was when he said "Well, I have, I'm still high and you're going to go away." Instead of honoring this attempt to terminate questioning, the detective responded "I can't go away. I can't do that." This response came from the same person who at the start of the interrogation advised Wilkes "You

can decide at any time to exercise these rights, not answer any questions, or make any statements."

This was not Wilkes' sole attempt to reclaim his right to cease questioning. A few questions later, Wilkes responded "No I can end this today with me, and I don't have to know shit." Instead of scrupulously honoring Wilkes' request, the detective suggests, instead, Wilkes has a duty to answer because "Donna's family . . . deserves an explanation . . . " The detective continued:

> I got a family that deserves an explanation . . . answer me this Danny what if something happened like this to your child *and the Police said well the guy said he wanted to end it all right there so we let him. But did you find out what happened, no . . . we can't do that, that family deserves the Police to find out what happened, ok . . . . And we got two small kids, ok so to think that we are going to go away, is not going to happen.*

Once again Wilkes is being told that his *Miranda* warnings were a sham, a formality with no substance. Wilkes' response to being told that the police won't go away was "you can now . . . , " yet another attempt to end the interrogation.

The detective's statement is important, because it demonstrates the detective understood Wilkes was seeking to end the interrogation. That is clear from the emphasized portion of the statement. The detective was hypothesizing that Wilkes' child was murdered and that he was asking Wilkes how Wilkes would feel if he was told by the police that ". . . the guy said he wanted to end it all right there so

we let him." This demonstrates the detective's clear understanding that Wilkes had tried to end the questioning. The detective continues with the victim's family hypothetically asking "But did you find out what happened . . . ." To this the detective tells Wilkes ". . . we can't do that, that family deserves the police to find out what happened, ok . . . ."

No magic words are required to invoke one's right to silence. Certainly if the interrogator understands the suspect is requesting a cessation of questioning then that is sufficient. The detective's response to Wilkes' request indicates rather clearly the detective understood Wilkes was requesting to stop. Wilkes is then asked another question to which Wilkes makes yet another attempt to end the interrogation saying:

> I don't want to talk about it no more. I don't want to think about it. Cause right now I'm still high . . .

Questioning continued. When the detective was asked about this by Wilkes' attorney at the Motion To Suppress Statements hearing, the following exchange occurred:

> A. Why did I not stop?
> Q. Yes.
> A. He didn't ask for an attorney.
> Q. Is that the only reason you would have stopped, is if he asked for an attorney?
> A. If he asked for an attorney or counsel, to consult with counsel, we would have stopped.

> Q. So no matter how many times he would have said I don't want to talk about it any more, you would have still continued?
> A. Until he asked for an attorney or a lawyer, I would probably have continued.

This came from the person who had earlier assured Wilkes he could cease answering questions at any time.

Shortly after giving the above testimony the detective was asked a leading question by the prosecutor about what he would have done if Wilkes made it "completely clear and unequivocal" he wanted to stop. Predictably, the detective gave the answer suggested by the leading question - - "I would have stopped the interview." Apparently the detective was unaware that something other than a request for counsel required termination of questioning until he was educated otherwise by the prosecutor's question.

Wilkes was charged with all three murders. The State filed a death penalty request alleging as a statutory aggravating circumstance of each murder that Wilkes had committed multiple murders and, as to Sydne, that the victim was less than twelve years old.

The jury found Wilkes guilty of all three murders. In the penalty phase, the jury found all four aggravating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances, but could not agree on a sentencing recommendation. After discharging the jury, the trial court conducted the sentencing. The court accepted the jury's findings and independently found the aggravating circumstances and

that the aggravating circumstances outweighed the mitigating circumstances. The court did not consider the fact that the jury could not recommend an appropriate sentence in determining sentence, although the Indiana Supreme Court subsequently reconsidered its prior rulings and determined it is now appropriate for a court to consider the jury's indecision as a sentencing factor in a capital proceeding.

For each murder, the trial court sentenced Wilkes to death.

REASONS FOR GRANTING THE PETITION

1. Detectives continued a custodial interrogation of Wilkes despite the belief of one of the detectives that Wilkes had asserted his right to silence thereby violating the Fifth Amendment to the United States Constitution.

During the custodial interrogation of Wilkes in Vincennes he appears to have asserted his right to silence when he said, "No I can end this today with me, and I don't have to know shit." Although the attempt may have been ambiguous, the response of the detective leads to the conclusion that he understood that Wilkes was asserting his Fifth Amendment right. Wilkes should not have been questioned further and the use of his responses to subsequent questions were improperly used against him at trial.

In *Davis v. United States*, 512 U.S. 452, 459 (1994) the Court held that for an apparent request for counsel to require the cessation of a custodial interrogation the request

must be unambiguous. The standard used in determining if such a request has been made is an objective one. *Davis*, 512 U.S. at 458-59. The reasoning and rule of *Davis* have been extended to one's assertion of his right to silence. *Berghius v. Thompkins*, - - U.S. - - (June, 2010).

Here, Wilkes' request may have been objectively ambiguous. However, the detective understood his request to be one to cease questioning. If the purpose of an unambiguous assertion is to assure that one is asserting his right to silence then that purpose is fully served when the interrogating officer understands that an objectively ambiguous request is, in fact, such a request. To draw a distinction between the two would lead to the absurdity of an objectively unambiguous request not subjectively understood as such by the officer requiring suppression of a statement when an ambiguous request which the officer understands to be an assertion of one's right would lead to an admissible statement.

2. The Indiana death penalty statute violates the *Apprendi/Ring* Doctrine and unconstitutionally permits the court to weigh aggravating circumstances against mitigating and determine the appropriateness of a sentence of death, life imprisonment, or a term of years.

The "weighing" component of Indiana's death penalty scheme is a *Ring* element. *See Ring v. Arizona*, 536 U.S. 584 (2002); and, *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under I.C. §35-50-2-9, if the jury finds the existence of at least one (1) aggravating circumstance under I.C. §35-50-2-9(b), it appears the jury is asked to perform two (2) tasks. The first task requires the jury

consider whether aggravating circumstances outweigh the mitigating; and, the second task requires the jury to make a unanimous sentencing recommendation, based on the weighing, as to whether the defendant should be sentenced to death, life without parole, or a term of years. I.C. §35-50-2-9(e), (l). Indiana's statute suggests these two (2) tasks are related to one another, as the recommendation should be based upon the "weighing" process and findings required by I.C. §35-50-2-9(l); however, I.C. §35-50-2-9(e) still requires the jury to find that death is appropriate. I.C. §35-50-2-9(e).

I.C. §35-50-2-9(e) requires the "jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed." I.C. §35-50-2-9(e), this constitutes a finding and is the "functional equivalent" of an element of a capital offense. A defendant does not become death-eligible until a jury finds death appropriate under I.C. §35-50-2-9(e), because I.C. §35-50-2-9(l) does not require the imposition of death merely because aggravating circumstances outweigh mitigating. The finding that aggravating circumstances outweigh mitigating is a fact that, if found, merely exposes a defendant to an enhanced sentence.

The response to this reasoning would be the appropriateness step defined in I.C. §35-50-2-9(e) is not a finding at all; but, merely a procedural part of the sentencing process. That is, the only findings necessary to make a defendant eligible for death are: (1) a conviction for a capital offense; and (2) a finding that one (1) of the statutorily-enumerated aggravating circumstances exists. Once those two (2) things have been found, death is now within the sentencing range, and the dictate "the jury shall

recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed," required by I.C. §35-50-2-9(e) becomes substantively meaningless.

This understanding is flawed. Although steps (1) and (2) are *necessary pre-requisites*, they are not *sufficient* to impose a death sentence by themselves. These findings make a defendant "death-eligible" only in the sense you cannot impose a death sentence without them; i.e., they are *necessary conditions*. Even with such findings, a death sentence is not available until a jury determines aggravating circumstances outweigh mitigating and death is appropriate. The *appropriateness finding* under I.C. §35-50-2-9(e) is the finding that exposes a defendant to death. The actual recommendation of death constitutes the final step in the process; when the jury engages in "*old school*" sentencing; i.e., selecting punishment.

In *Apprendi*, the Court held ""[o]ther than . . . a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . [and further] it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The statutory range for murder is a term of years, forty-five (45) to sixty-five (65) years. I.C. §35-50-2-3. Only after a jury has determined that death or life imprisonment is appropriate, is the statutory maximum prescribed by statute increased under I.C. §35-50-2-9. Exposure to the death penalty only turns upon a finding by the jury that death is

the appropriate sentence, as between life without parole and a term of years. I.C. §35-50-2-9(e).

While the conviction, the return of at least one (1) statutory aggravating circumstance, and a finding the aggravating circumstances outweigh mitigating all make a defendant "eligible" for death in the Eighth Amendment sense – in that they narrow the class of persons on whom death might be imposed – those findings are not statutorily *sufficient* in a Sixth Amendment *Apprendi/Ring* sense to expose a defendant to a death sentence. Death is "justified," i.e. *authorized*, only after the fact-finder has determined death is appropriate in lieu of other options. Absent that finding, death is simply not within the range. I.C. §35-50-2-3. In the case of a "hung jury," the maximum sentence which may be imposed by the court is a term of years. The sentences of death in this matter were imposed in violation of the Sixth Amendment.

3. The Indiana Supreme Court determined that the jury's inability to arrive at a unanimous decision with regard to the penalty should have been considered by the court in deciding the appropriate sentence, but this factor was not considered by the trial court; and, therefore, the Indiana Supreme Court should have remanded the case for resentencing.

The trial court considered the issue of whether the jury's inability to arrive at a unanimous decision with regard to the penalty should be considered in deciding Wilkes' sentences. While the trial court concluded the law in Indiana that presently existed was clearly stated in *Roche v. State*, 596 N.E.2d 896, 899 (Ind. 1992), where this Indiana Supreme Court held that a jury's inability to reach

a recommendation "should not be considered as a mitigating factor during the penalty phase;" the court reasoned that this rule could be revisited as a result of changes which have occurred with regard to standards and procedures in capital cases. *See Burris v. State*, 642 N.E.2d 961 (Ind. 1994).

The trial court reasoned the first of these changes is the narrowing of the trial court's permitted considerations in determining an appropriate penalty. The court asserted guidance was limited as to how it was to choose between a sentence of death, life imprisonment, or a terms of years. The trial court reasoned Indiana's capital sentencing scheme was modified in 2002, and the jury's recommendation with regard to the penalty in capital cases was now binding upon the court, rather than advisory. The trial court's quandary showed the court was uncomfortable it could not consider the fact the jury was not able to reach a sentence recommendation.

In considering this issue on appeal, the Indiana Supreme Court reasoned and held:

> In this case, the trial court considered itself bound by *Roche* and concluded that it could not consider the jury's lack of recommendation in selecting a penalty. The trial court noted that subsequent statutory amendments and case law could be viewed as relevant to the issue, but appropriately left any change in the law to this Court.
>
> We last visited this issue in 1996. In 2002, the General Assembly amended the death

penalty statute to make the jury's sentencing recommendation binding on the judge in most circumstances. I.C. § 35-50-2-9. We think this increased emphasis on the role of the jury provides a reason to reconsider the *Roche* line of cases. The lack of unanimity among the jurors does not bear on the defendant's conduct or any facts that tend to lessen his culpability. It does, however, demonstrate a level of uncertainty among the citizens who considered the evidence as to the appropriate penalty. It is therefore more properly considered a relevant consideration than a mitigating circumstance, but it is a factor the trial court should be permitted to consider in determining the appropriate sentence. We therefore reach the same result as the *Roche* and *Burris* dissenters and hold that it is "appropriate" for the trial court to consider the fact that the jury-whose recommendation would otherwise be binding-could not agree. We do not find the trial court's adherence to then-existing precedent to be error, much less reversible error. The trial court expressly stated its independent conclusion that the aggravating circumstances outweighed the mitigating circumstances and thus the death penalty was appropriate.

Wilkes v. State, 917 N.E.2d 675, 692-693 (Ind. 2010).

Death is different; and, irrespective of whether you classify the jury's inability to reach a sentencing recommendation as a "relevant consideration" or a "mitigating circumstance," it is apparent from the record this fact was not considered.

The trial court should have considered this factor and did not in arriving at its conclusion that death was approp-riate. The balancing process in a capital sentencing context is a delicate process; and, in this case the process was upset, "creat[ing] the possibility . . . of randomness." *Stringer v. Black*, 503 U.S. 222, 231 (1992). This United States Supreme Court has recognized:

> [W]e conclude . . . the sentencer ... [should] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . .
>
> *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (*citing*, *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

Wilkes proffered the jury's indecision was a basis not to impose the death penalty. In light of the fact the Indiana Supreme Court reconsidered its reasoning in *Roche* and *Burris*, the matter should have been remanded to the trial court for resentencing.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DANIEL RAY WILKES

Petitioner

V.

STATE OF INDIANA,

Respondent

On Petition for a Writ of Certiorari

To the Indiana Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE
SUPREME COURT OF INDIANA

No. 10S00-0808-DP-453

DANIEL RAY WILKES, *Appellant (Defendant below)*

v.

STATE OF INDIANA, *Appellee (Plaintiff below).*

Appeal from the Clark Circuit Court,
No. 10CO1-0705-MR-158
The Honorable Carl A. Heldt, Special Judge

On Direct Appeal

December 10, 2009

Boehm, Justice.

In this direct appeal, Daniel Wilkes appeals his murder convictions and death sentence.
We Affirm Wilkes's murder convictions and death sentence.

Facts and Procedural History

In the spring of 2006, Daniel Wilkes met Donna Claspell and Michael Baker while all three were being treated at a drug rehabilitation center. After discharge, Wilkes stayed with Donna and her two daughters, eight-year-old Sydne Claspell and thirteen-year-old Avery Pike. Wilkes told Baker that one night he awoke to find Avery "hunching on his leg," and that he and Avery then engaged in mutual oral sex. Wilkes later admitted to molesting Avery on a total of three or four occasions. On the evening of April 23 or the early morning of April 24, Donna found Wilkes and Avery together and told Wilkes that he would have to leave the home.

Around eight o'clock the next morning, Donna's neighbors observed Baker picking up Wilkes at the home, and one heard Wilkes say something like, "I've got to get out of here." That night, according to Baker, Wilkes kept looking out the windows and expressed concern that the police would come for him.

On April 26, the bodies of Donna, Sydne, and Avery were found in their home. Donna and Sydne were in the master bedroom. Donna had sustained multiple injuries, including a deep cut wound to the neck and blows to the head from a hammer and another blunt instrument. A knife was found under Donna's shoulder. Sydne had died from at least twenty-seven blows to the head, back, and shoulders from a hammer head and claw. Avery was found in her bedroom naked and face down on the bed. Her hands were bound behind her back with a cord, her ankle was tied to the bedpost, and she had been strangled with a piece of clothing.

DNA and serological tests were performed on several items from Donna's home and also on clothing Wilkes was wearing at the time of his arrest. Donna's blood was found on the ball and claw of a hammer and on a level found at the home, and also on a shirt and hat worn by Wilkes. Sydne's blood was found on the claw of the hammer and on Wilkes's shirt and her DNA was found on Wilkes's shoe. Wilkes confessed to the murders under circumstances described below.

Wilkes was charged with all three murders. The State filed a death penalty request alleging as a statutory aggravating circumstance of each murder that Wilkes had committed multiple murders and, as to Sydne, that the victim was less than twelve years old.

The jury found Wilkes guilty of all three murders. In the penalty phase, the jury found all four aggravating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances, but could not agree on a sentencing recommendation. After discharging the jury, the trial court conducted the sentencing. The court accepted the jury's findings and independently found the aggravating circumstances and that the aggravating circumstances outweighed the mitigating circumstances. For each murder, the trial court sentenced Wilkes to death.

In this direct appeal, Wilkes challenges his convictions and his sentence, arguing that:

I. The trial court erred in admitting transcripts and recordings of four interviews in which he acknowledged his guilt;

II. The trial court erred in admitting evidence of his molesting of Avery, expert testimony

regarding a presumptive test for blood, and opinion testimony on guilt;

III. Indiana's death penalty statute violates the Indiana Constitution's requirement of separation of powers and the Federal Sixth Amendment; and

IV. Wilkes was not sentenced properly.

I. Admissibility of Wilkes's Interviews

At trial, over Wilkes's objection, the State introduced transcripts of four interviews in which Wilkes acknowledged his guilt. A videotape of the first interview and audio recordings of the other three were also admitted. Wilkes argues that the trial court erred in admitting these because the interviews were given involuntarily in violation of his right to remain silent.

Unlike the Federal Constitution, Indiana law imposes on the State the burden of proving beyond a reasonable doubt that a confession is voluntary. Lego v. Twomey, 404 U.S. 477, 488-89, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); Pruitt v. State, 834 N.E.2d 90, 114-15 (Ind.2005) (plurality); Miller v. State, 770 N.E.2d 763, 767 (Ind.2002); Owens v. State, 427 N.E.2d 880, 884 (Ind.1981). In evaluating a claim that a statement was not given voluntarily, the trial court is to consider the "totality of the circumstances," including any element of police coercion; the length, location, and continuity of the interrogation; and the maturity, education, physical condition, and mental health of the defendant. Miller, 770 N.E.2d at 767. To determine that a statement was given voluntarily, the court must conclude that inducement, threats, violence, or other improper influences did not overcome the defendant's free will. Clark v. State, 808

N.E.2d 1183, 1191 (Ind.2004).

On appeal, the trial court's determination of voluntariness is reviewed as other sufficiency matters. *Id.* We do not reweigh the evidence, and we affirm the trial court's finding if it is supported by substantial evidence. Miller, 770 N.E.2d at 767.

A. *April 26 Interview*

Wilkes's first interview by police took place on April 26 from approximately 6:00 to 11:00 p.m. and was videotaped. Before making any statements, Wilkes was advised of his *Miranda* rights and signed a written waiver. Wilkes was provided dinner and cigarettes at a half hour break around 9:30 p.m. In the course of the interrogation, Wilkes admitted to killing Donna, Avery, and Sydne. Wilkes claims that any statements in the April 26 interview were involuntary because of the convergence of the following factors: (1) he was under the influence of drugs during the interview; (2) police used a psychologically coercive interrogation method; (3) the statements in his interview contained inconsistencies; (4) police promised Wilkes a cigarette in exchange for information; and (5) Wilkes attempted to end the interrogation before admitting to the crimes.

1. *Influence of drugs.* At five points in the April 26 interrogation Wilkes claimed to be under the influence of drugs. Statements are inadmissible due to intoxication only when an accused is intoxicated to the point that he is unaware of what he is saying. Pruitt, 834 N.E.2d at 115 (plurality opinion) (citing Williams v. State, 489 N.E.2d 53, 56 (Ind.1986)). Intoxication to a lesser degree goes only to the weight to be given the statement. Id. Here, Wilkes does

not claim that his intoxication caused him to be unaware of his statements during the interview, and the detectives who interrogated him testified that he did not appear intoxicated. The trial court's ruling that Wilkes's interview was not involuntary due to his intoxication is supported by sufficient evidence.

2. *Psychologically coercive interrogation methods.* Wilkes argues that the April 26 interrogation was coercive because the detective insisted that Wilkes remembered the crimes and supplied him with details even though Wilkes repeatedly denied remembering the crimes. Wilkes argues that his confession was involuntary because he merely repeated back to the detective facts he learned during the interrogation.

Certainly a confession in which the defendant parrots detective-fed details of the crime may be less reliable than one in which the defendant freely volunteers his story in its entirety. But under Wilkes's circumstances, the trial court had sufficient evidence to find that Wilkes was not psychologically coerced. Because the exchange was videotaped, the trial court was in a position to evaluate demeanor.[1] The interrogation lasted five hours, and Wilkes was provided with three cigarettes and a break for food. It is true that the detective provided Wilkes with many details of the crimes, but Wilkes also described details of the crimes that were not provided by the detective. For example, he stated that he had a flash of Donna lying on her bed in a lot of blood before the detective told him that Donna was found on her bed. Moreover, in the interviews Wilkes identified instances when he was referring to police suggestions rather than his own memory. Wilkes cites no

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[1] The videotape of the April 26 interview was admitted in evidence but was not included in the appellate record.

authority for his contention that supplying some facts to a defendant renders the defendant's statement involuntary. This Court has previously held that various interrogation techniques-"good cop, bad cop," providing a morally acceptable answer, blaming the victim, and bargaining-do not necessarily create an involuntary statement. Pierce v. State, 761 N.E.2d 821, 824 (Ind.2002). Given all of these considerations, the trial court's conclusion that the interrogation method did not render Wilkes's interview involuntary is supported by more than sufficient evidence.

3. *Inconsistent statements.* Wilkes cites to inconsistencies in his April 26 interview as evidence that his statements were not voluntarily given.[2] Inconsistencies are a factor to be considered in determining whether a statement is voluntary. Light v. State, 547 N.E.2d 1073, 1077 (Ind.1989). But inconsistencies can also be the product of untruthfulness or evasiveness, and are not in themselves a strong indication of lack of voluntariness. The trial court had the opportunity to view the videotape of the interrogation and make a determination as to whether Wilkes's will had been overcome. Again, given the circumstances of this interrogation the trial court had sufficient evidence to find that Wilkes's responses were voluntary and that the jury could consider the inconsistencies in determining whether to give the interview credit.

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[2] For example, on page 40 of the interrogation transcript, Wilkes said, "I did it." On page 44, he said he did not know whether Michael Baker did it. On page 45, he said he did it and then claimed, "I don't remember doing it." On page 52, when asked who killed Donna, he responded, " Me, I guess." Then he said, " I don't think I killed her." ON page 53, he said, "I killed her I guess." Later he suggested that Baker killed Donna.

4. *Promise of a cigarette.* Wilkes requested cigarettes several times during the April 26 interrogation. Late in the interrogation, after Wilkes had already made incriminating statements, he again asked for a cigarette. The following exchange occurred:

WILKES: I need another cigarette, please. And we'll talk.

* * *

DETECTIVE: Are you going to tell me the truth if I get you a cigarette?

A: Yeah.

Q: Flat out bottom, no more lying. Will you do that?

A: Yes.

Q: Now, all I got to do is give you one more cigarette?

A: Two.

Q: I'll give you one. You tell me, then I'll give you another one. But I want you to tell me the truth.

A: Ok.

Wilkes was provided with a cigarette, and the interrogation continued on to topics such as Wlkes's job history, his daughter, and his experience with methamphetamine before returning to the murders. Roughly seven minutes after receiving the cigarette,[3] when asked "what happened that

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[3] Without the interview videotape, we cannot determine exactly how much time passed between the offer of a cigarette and the incriminating statements. Based on the transcript's length of 140 pages and the total interview time of 4 hours and 12 minutes, each page covered an average of 1 1/2 to 2 minutes. The incriminating statements were made 5 pages after receiving the cigarette and 8 pages after the detective's offer.

night," Wilkes said, "I did it ... I just remember hitting." Later, Wilkes was offered food and another cigarette.

The offer of a cigarette specifically in exchange for information could be viewed as an inducement leading to an involuntary confession. However, given the lapse in time between the cigarette and this admission and that Wilkes had already admitted to having flashes of Donna in a bloody bed and of Avery facedown and bound in her bed, the trial court had sufficient evidence to conclude that Wilkes's will was not overcome by the promise of a cigarette. See Anderson v. Terhune, 467 F.3d 1208, 1213 (9th Cir.2006) (statement not involuntary when detectives withheld cigarettes until defendant agreed to talk) (rev'd en banc on other grounds, 516 F.3d 781 (9th Cir.2008)).

5. *Wilkes's attempt to end the interrogation.* Finally, Wilkes argues that his April 26 interview was involuntary because he attempted to end it several times before making admissions. Wilkes points to the following phrases as attempts to end the interrogation: "Well, I have, I'm still high and you're going to go away," "No I can end this today with me, and I don't have to know shit," and "I don't want to talk about it no more. I don't want to think about it. Cause right now I'm still high." After each statement, Wilkes continued conversing with the detective.[4]

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[4]For example, after the latter statement, the dialogue continued on:

DETECTIVE: But, but don't you ...

WILKES: and I don't ...

Q: I understand that, but the truth is there.

A: But I don't just don't want to know, that high and I really don't want to think about it.

Q: Ok, don't you want to get it ... You told me while ago

An assertion of the *Miranda* right to remain silent must be clear and unequivocal. Clark, 808 N.E.2d at 1190. In determining whether a defendant has asserted this right, the statements are considered as a whole. *Id.* Mere expressions of reluctance to talk do not invoke the right to remain silent. *Id.* This Court has held several times that raising doubts or expressing concern about continuing followed by continued dialogue do not unambiguously assert the right to remain silent. *Id.*; Griffith v. State, 788 N.E.2d 835, 842 (Ind.2003) ("I might as well not say anything more," followed by disclosure of information, did not invoke the right to remain silent); Haviland v. State, 677 N.E.2d 509, 514 (Ind.1997) ("I'm through with this," followed by continued dialogue did not unambiguously assert the right to remain silent). Here, after each of Wilkes's purported attempts to end the interrogation, he continued to speak with the detective. The trial court's conclusions that Wilkes did not unequivocally assert his right to remain silent, and that his further statements were voluntary, were supported by sufficient evidence.

B. *April 27 Interview*

Wilkes argues that statements made in the course of his April 27 interview are inadmissible because the interview was not preceded by a Miranda warning. The April 27 interview began at 2:35 a.m., less than four hours after the April 26 interview ended.

---

you wanted to tell the truth, you wanted to get it off your ...

A: I think this time tomorrow morning, I'll be dead too.

A similar claim was made by the defendant in Ogle v. State, 698 N.E.2d 1146 (Ind.1998). In Ogle, the defendant signed a waiver of Miranda rights and was questioned. Questioning stopped for less than an hour, and then resumed without a second Mirandizing. We noted:

> Although it might be the better practice to reiterate such warnings after an interruption of questioning, a readvisement is only necessary when the interruption deprived the suspect of an opportunity to make an informed and intelligent assessment of his interests. If the interruption is part of a continual effort to investigate the suspect, then the suspect's interests remain fairly clear.

698 N.E.2d at 1149 (internal citations omitted); *cf.* 2 Wayne R. LaFave et al., Criminal Procedure § 6.8(b) (3d ed. 2007) ("It is generally accepted that fresh warnings are not required after the passage of just a few hours."). Although the break in Ogle was shorter than the break here, the interruption in Wilkes's interrogation was part of a continuing investigation, and Wilkes's interests remained clear. The trial court therefore did not err in admitting the April 27 interview at trial.

C. April 28 Media Interview

After Wilkes was in custody, the media requested an interview. The police presented Wilkes with a standard media consent form, which he signed. The consent form

did not advise Wilkes of his right to counsel or of his right to refuse the interview, although the line above Wilkes's signature stated: "INMATE MAY WAIVE ATTORNEY'S SIGNATURE BY SIGNING BELOW." The officer who provided the form to Wilkes testified that he did not know whether Wilkes had a lawyer. During the media interview, Wilkes confessed to the murders and to molesting Avery.

Wilkes argues that he should have been advised of his right to counsel before taking the media interview. Wilkes cites Standard 8-2.1 of Part II of the ABA Standards for Criminal Justice, which suggests that officers should not

exercise their custodial authority over an accused individual in a manner that is likely to result in ... the interviewing by representatives of the news media of a person in custody except on request or consent by that person to an interview after being informed adequately of the right to consult with counsel and the right to refuse to grant an interview.

Recently in Ritchie v. State this Court discussed whether Miranda warnings are required before media interviews. 875 N.E.2d 706, 717 (Ind.2007). We concluded that Miranda warnings are required only to overcome the "inherently coercive and police-dominated atmosphere inherent to a custodial interrogation," and that "civilians conducting their own investigation need not give *Miranda* warnings." Id.; *see also* 2 LaFave, *supra*, § 6.10(b) ("[I]t is clear that *Miranda* does not govern interrogation by private citizens acting on their own. This covers ... a newspaper reporter...."). The ABA Standards have not been adopted in Indiana. Unless and until the ABA Standards have been adopted and apply prospectively, we reaffirm our holding in Ritchie and conclude that the trial court did not err in

rejecting Wilkes's claim that the media interview must be excluded from evidence.

D. *April 28 Interview*

On April 28, approximately thirty-seven hours after his April 27 interview by police, Wilkes was questioned by police a third time. This interrogation was preceded by *Miranda* warnings. Wilkes argues that statements in this interview were inadmissible because "the State failed to prove it was free from the taint of the earlier statements." Because we find no taint in Wilkes's earlier interviews, we conclude that the trial court did not err in admitting the April 28 interview.

II. Evidentiary Issues

Wilkes claims three errors in the admission of evidence at his trial. As to two of these, we do not agree that there was error, and as to the third we find that any error was harmless.

A. *Indiana Evidence Rule 404(b)*

Indiana Evidence Rule 404(b) prohibits evidence of other crimes, wrongs, or acts to "prove the character of a person in order to show action in conformity therewith." However, the Rule expressly allows such evidence for other purposes, including proof of motive. In this case, Wilkes confessed to sexual activity with thirteen-year-old Avery, and the State successfully sought to admit these confessions as evidence relevant to Wilkes's motive for the murders. Wilkes does not contend that this evidence is

irrelevant to motive. Nor does he claim that the prejudicial effect of this evidence outweighs any probative value. Rather, he contends that the corpus delicti rule bars proof of his confession to child molesting.

In Indiana, a crime may not be proven based solely on a confession. Admission of a confession requires some independent evidence that a crime was committed. Workman v. State, 716 N.E.2d 445, 447 (Ind.1999). Wilkes points out that there is no evidence other than his confession that the crime of child molesting was committed. Wilkes objected generally that his confessions to sexual activity with Avery were inadmissible as prior crimes or bad acts, but did not raise the corpus delicti point. Although the issue is not preserved for appeal, we choose to address it.

The corpus delicti rule does not apply to evidence of other crimes permitted by Evidence Rule 404(b). The purpose of the corpus delicti rule is to prevent conviction for a crime that did not occur. Sweeney v. State, 704 N.E.2d 86, 111 (Ind.1998); 1 Wayne R. LaFave, Substantive Criminal Law § 1.4(b) (2d ed.2003). That purpose does not apply to evidence of crimes offered under Rule 404(b) to establish motive or intent because there is no danger of conviction for those crimes. Moreover, the *corpus delicti* rule does not apply here because admission under Evidence Rule 404(b) does not require proof sufficient for conviction. Evidence of other wrongs or acts is admissible if it is relevant to establish motive, intent, identity, and the like, irrespective of whether there has been a conviction. Prior crimes offered under Rule 404(b) need not establish the crime beyond a reasonable doubt. See 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5249, at 535 (1978) (addressing

the same issue under Federal Rule of Evidence 404(b)). The same reasoning applies to other rules of sufficiency of evidence, including corpus delicti. Accordingly, the trial court correctly admitted Wilkes's confessed molestation of Avery.

B. *Indiana Evidence Rule 702(b)*

Wilkes argues that it was error to admit phenolphthalein test results because the State did not lay a foundation explaining the test's reliability. Indiana Evidence Rule 702(b) governs the admissibility of expert scientific testimony. The Rule provides that expert scientific testimony is admissible only if "the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Reliability of a test may be established by judicial notice or by a sufficient foundation to establish reliability. Malinski v. State, 794 N.E.2d 1071, 1084 (Ind.2003). The trial court's decision to admit scientific testimony under Rule 702(b) is reviewed for abuse of discretion. Rondon v. State, 711 N.E.2d 506, 516 (Ind.1999).

On the third day of a five-day guilt phase, the court held a hearing on Wilkes's motion in limine to preclude the State's witness from testifying that a stain from Wilkes's shoe on April 26, 2006 tested "presumptive" for blood using a phenolphthalein test. At the hearing, the witness, who had been trained in the identification of body fluids and had testified as an expert sixty times, testified that she performed a phenolphthalein test that indicated the "possibility" of the presence of blood in the stain. An additional test would be required to determine whether the substance was in fact blood. The witness further testified

that she had performed hundreds, perhaps thousands of phenolphthalein tests and that the "majority of the time," if a presumptive test was followed by a definitive test for blood, the latter confirmed the presence of blood. Here, no additional test was performed to confirm that the stain on Wilkes's shoe was blood because the quantity was insufficient to do both a blood test and a DNA test. The DNA test revealed that the stain was biological matter from Sydne. After hearing this testimony, the trial court ruled that the uncertainty of the phenolphthalein test went to its weight, not its reliability, and allowed the witness to reprise this testimony at trial.

When the expert did testify and presented her report that the stain tested "presumptive" for blood, Wilkes made no further objection. The State argues that Wilkes's failure waived any error in permitting the expert to testify that the stain tested presumptive for blood. The State is correct that a failed motion in limine to exclude evidence ordinarily does not eliminate the requirement that a party must object at the time the evidence is offered at trial to preserve the issue for appeal. Brown v. State, 783 N.E.2d 1121, 1125 (Ind.2003). But this rule arises from cases where motions in limine, as is usually the case, were made before trial. The rule is derived from a desire to give the trial court the opportunity to reconsider the ruling in light of subsequent developments at trial. *See id.* Here the trial court's ruling on the motion was made after a mid-trial hearing and the witness testified immediately after the hearing, so the issues were fully developed and fresh in the trial court's mind. Under these circumstances we find the issue preserved for appeal.

Although the issue is preserved, we find it without merit. First, by far the most damaging part of this testimony

was that Sydne's DNA was found in the stain. Whether it was from blood or another source, Sydne died from over twenty blows that left not only her blood but also other tissue on a weapon found at this horrific scene. Second, and equally important, to the extent there was any significance to whether the stain was blood rather than some other biological material bearing Sydne's DNA, the State's witness explained that the test was only presumptive and required confirmation to establish conclusively that the stain was in fact blood. She also explained that a presumptive test made it more probable than not that a definitive test would confirm the presence of blood. The test was therefore admissible evidence, if not conclusive, on this point.

C. Evidence Rule 704(b)

Indiana Evidence Rule 704(b) prohibits witnesses from giving opinions concerning guilt in a criminal case. Wilkes argues that a statement made by the detective during the April 26 interrogation was an opinion of Wilkes's guilt and should have been excluded.

Before trial, Wilkes requested that the court redact from the transcript "any statements made by the police that implicitly or explicitly convey the officer's opinions concerning Wilkes's intent, guilt or innocence...." The trial court denied this motion. Wilkes renewed his objection at trial, and it was overruled. At trial, a transcript of the April 26 interrogation was admitted as an exhibit. The transcript contained the following conversation:

> DETECTIVE BROWN: Mmm-hmm. Alright, am I bringing up any ...

WILKES: No
Q: Memories, for Danny, Danny
A: I'm freaking out.
Q: Danny look at me buddy. Danny ... any cords used to hold somebody down?
A: Yeah ...
Q: Get mad. Put something around their throats ... this is what happened didn't it. Danny, it happened ...
A: I believe it happened.
Q: It happened. And you were there, you were there and we know it, and you know it, or we wouldn't be up here.

Wilkes argues that Detective Brown expressed his opinion of Wilkes's guilt when he stated, "It happened. And you were there, you were there and we know it, and you know it, or we wouldn't be up here."

In Smith v. State, 721 N.E.2d 213, 217 (Ind.1999), we held that admission of an officer's statement "I thought it was you" was error under Rule 704(b). We also found that the Rule prohibited admission of the following statement by an interrogating detective: "Something stinks. So basically all we've got is your word that Boogie shot this guy. Is that what you're telling us ... I think you was looking out for Boogie." Lampkins v. State, 778 N.E.2d 1248, 1251 (Ind.2002). The detective's statement here is similarly problematic under Rule 704(b), and the trial court erred in admitting it. However, admission of the detective's statement in this case-one line in an over one-hundred-page interview transcript and several days of evidence-was relevant only to guilt, not the penalty, and was harmless in

view of the forensic evidence and confessions supporting Wilkes's guilt.

III. Constitutionality of Indiana's Death Penalty Statute

A. *Use of "Special Verdict" Forms*

Wilkes challenges the provision in Indiana's death penalty statute that a penalty phase jury "shall provide a special verdict form for each aggravating circumstance alleged." Ind.Code § 35-50-2-9(d) (2004). Wilkes contends this provision is invalid because it conflicts with Indiana Trial Rule 49, which abolished "special verdicts," and therefore violates the separation of powers required by Article 3 of the Indiana Constitution by invading the province of the Judiciary.

The findings required by the statute to be reflected in the document referred to by the statute as a "special verdict form" are qualitatively different from the special verdicts to which Trial Rule 49 refers. In a conventional trial contemplated by Trial Rule 49, the jury must resolve all matters submitted to it. Special verdicts were abolished to eliminate the confusion and lack of finality generated by a maze of potentially confusing subsidiary questions. But the form required by the death penalty statute does not ask for preliminary or subsidiary findings leading to the ultimate verdict. Rather, it sets out the jury's findings as to the ultimate facts required to be resolved by the jury in a death penalty case. The jury may, but is not required to, reach a recommendation as to the penalty. The form thus documents whether the jury finds the defendant eligible for the enhanced penalty.

Use of the form is necessitated by the Sixth Amendment right to jury trial as applied to the two-phased trial required by the death penalty statute. The Indiana death penalty statute requires that one or more statutorily identified "aggravating circumstances" be found before a defendant is eligible for the death penalty. I.C. § 35-50-2-9(a). In this case, these circumstances were multiple murders and a killing of a child under twelve years of age. The statutory provision for special verdicts is designed to assure compliance with the federal constitutional requirements announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). These cases established that the Sixth Amendment requires that the jury find all matters necessary to enhance the punishment. Because the Sixth Amendment to the Federal Constitution requires these jury findings, we do not regard the statute as conflicting with the general prohibition against special verdicts. Rather, it provides a necessary step in determining whether the defendant is eligible for the death penalty. We therefore accept the provision for special verdicts as a proper means of implementing the requirement that a statutory aggravating circumstance be found by a jury before a defendant is eligible for the death penalty.

B. *Sentencing by the Court*

Under Indiana's death penalty statute, if the jury makes a recommendation as to sentence, the trial court is to sentence "accordingly." I.C. § 35-50-2-9(e). The following subsection, I.C. § 35-50-2-9(f), provides that if a jury is unable to reach a recommendation as to penalty, the court

is to proceed "as if the hearing had been to the court alone." Wilkes argues that, as a matter of statutory construction, this section does not allow the court to rely on the jury findings as to aggravators or weighing. We agree that the trial court must make its own determination whether the aggravating circumstance is established beyond a reasonable doubt and whether the aggravators outweigh the mitigating circumstances.

We take the quoted language from subsection (f) to mean the court is to sentence as it would have if the case had been tried without a jury. We note that this Court implicitly adopted that view in State v. Barker:

> It is thus conceivable that a penalty phase jury could return a verdict finding one or more aggravators proven beyond a reasonable doubt, but be unable to reach unanimous agreement on whether any mitigating circumstances are outweighed by the aggravating circumstances. Where a jury is thus unanimous in finding one or more aggravating circumstances proven beyond a reasonable doubt but unable to agree on a sentence recommendation, Subsection 9(f) applies to instruct that the court shall "discharge the jury and proceed as if the hearing had been to the court alone." In this event the trial court shall, based upon the evidence presented to the penalty phase jury, impose a sentence of death or life without parole ... or it may impose a term of years.

809 N.E.2d 312, 316 (Ind.2004). This does not imply that

the jury's findings as to aggravators or weighing are to be disregarded. To the contrary, Apprendi and Ring require that the jury find a statutory aggravating circumstance. Without this finding, the defendant's eligibility for the death penalty is not established, and no further consideration of the death penalty is required.

If the jury makes the requisite findings but cannot agree on a recommended sentence, subsection (f) requires the trial court to proceed "as if the hearing had been to the court alone." Subsection (g) requires the trial court to make the findings identified in subsection (*l*) "[i]f the hearing is to the court alone." One of the findings described in subsection (*l*) is that the State has proved beyond a reasonable doubt that at least one statutory aggravator exists. Subsection (*l*) also requires the trial judge to find the aggravating circumstance established beyond a reasonable doubt. The trial court here properly made these subsection (*l*) findings. Wilkes thus received the benefit of the requirement under the Sixth Amendment that the jury find the aggravating circumstances, and also the Indiana requirement that the trial judge independently arrive at the same finding.

Amicus curiae Marion County Public Defender Agency argues that the directive in subsection (f) to proceed "as if the hearing had been to the court alone" limits the trial court to imposing a term of years because the trial court is limited to a term of years in non-death penalty and life without parole cases where it sentences "alone." Amicus also argues that the death penalty statute creates a right to a jury determination of penalty, making a new penalty phase the proper remedy if the jury fails to make a recommendation. As we have explained, we think the 2002 amendments were intended to conform Indiana's

statute to the requirements of Apprendi and Ring. If there has been no waiver of jury trial, a jury must find the aggravating circumstances, but the death penalty statute also permits a court sentencing to take place if a jury has been waived. I.C. § 35-50-2-9(d)-(e). We think that if the jury finds aggravating circumstances but cannot agree on a recommendation, this statute merely permits the court to exercise its sentencing function "as if" the entire case had been tried without a jury. The result is that the requirements of subsection (f) apply, including the requirement that the trial court independently find the aggravating circumstances. But it does not convert the entire case to one tried free of the death penalty provisions.

C. Violation of Ring v. Arizona

The United States Supreme Court held in Ring v. Arizona that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in maximum punishment. 536 U.S. at 589, 122 S.Ct. 2428. Wilkes argues that under Ring, a jury must find that aggravators outweigh mitigators and that death is appropriate. This Court addressed this issue in Ritchie v. State, holding

> the federal constitution requires that eligibility for the death penalty be determined by the jury beyond a reasonable doubt, but it does not require that the decision whether to impose death be made by the jury, and it does not require the weighing, whether by judge or jury, to be under a reasonable doubt standard.

809 N.E.2d 258, 266 (Ind.2004), *cert. denied*, 546 U.S. 828, 126 S.Ct. 42, 163 L.Ed.2d 76 (2005). We reaffirm that view.

IV. Sentencing Issues

A. *Counsel's Concession of Aggravators and that Aggravators Outweighed Mitigators*

Wilkes argues that the trial court erred in finding that Wilkes conceded that all the aggravators were proved beyond a reasonable doubt and the aggravators outweighed the mitigators.

Statements by counsel in closing argument may be sufficient to constitute admission of an aggravator. Trusley v. State, 829 N.E.2d 923, 926 (Ind.2005) (counsel's statement "that the victim of the crime was less than twelve years of age" was an admission).

In opening statement and closing argument of the penalty phase, defense counsel made several statements that could be viewed as concessions. These include:

> We're not offering excuses or justifications for what happened. They're three innocent people that were brutally murdered and there's a weighing that the Court has instructed you to do. When you take those lives that were taken, there is no-there is no mitigating evidence, there's nothing about Danny's past or his upbringing that can possibly ever outweigh those three lives that were lost....
>
> ....

> We offer no excuse for the conduct that resulted in their horrific death ... but you've found him guilty of that and we acknowledge that the basis for bringing this charge that we'll ask you to recommend to the Court that Danny Wilkes be executed is based on the aggravating circumstances that ... more than one person and one of those people under the age of 12, that's what the aggravating circumstances are in this case, and we think there is nothing worse than that.
>
> ....
>
> [W]e believe that the information that's been provided to you through these witnesses should convince you and will convince you that Mr. Wilkes deserves to spend the rest of his life in prison....

Like the death penalty, imposition of life without parole requires a finding of a statutory aggravator and that the aggravator outweighs mitigators. These statements of counsel, like those in Trusley, are therefore sufficient to constitute admissions to both multiple murders and a victim under twelve years old, and also that the aggravators outweighed the mitigators. The trial court did not err in finding that counsel conceded these issues. The jury found these aggravators proved beyond a reasonable doubt and also that they outweighed any mitigators. The trial court in its sentencing order expressed its independent judgment that the aggravators were proved and that they outweighed the mitigators. Whether defense counsel conceded these

matters is therefore of no significance.

B. *Adjustment to Incarceration as a Mitigating Circumstance*

At his sentencing hearing, Wilkes presented evidence that he had adjusted to incarceration, behaved well in prison, and could safely serve a sentence of life without parole. Wilkes argues that the trial court was required to consider this evidence as a mitigating circumstance and that the court did not do so.

Wilkes cites Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) for the proposition that adjustment to incarceration is a mitigating circumstance that the trial court was required to consider. In Skipper, the trial court excluded evidence of the defendant's good behavior in prison. The Supreme Court reversed and held that this evidence could not be excluded from the sentencer's consideration because it might have served as a basis for a sentence less than death. *Id.* at 5, 106 S.Ct. 1669. The Supreme Court remanded for a new sentencing hearing in which the defendant could "present any and all relevant mitigating evidence that is available." *Id.* at 8, 106 S.Ct. 1669. We agree that Skipper established that positive adjustment to incarceration is relevant mitigating evidence and may not be excluded from the sentencer's consideration. As the Court noted, this is an application of the general rule that "the sentencer may not refuse to consider ... any relevant mitigation evidence." *Id.* at 4, 106 S.Ct. 1669 (quotation omitted) (citing Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). More recently the Supreme Court

reaffirmed that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Weeks v. Angelone, 528 U.S. 225, 232, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000); *see also* Tennard v. Dretke, 542 U.S. 274, 285-87, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (discussing Skipper with approval).

Unlike the defendant in Skipper, Wilkes was not prevented from presenting this evidence to the jury. Although the trial court is obligated to receive and consider mitigating factors, the trial court is not obligated to accept the defendant's contentions as to what constitutes a mitigating circumstance or to give the proffered mitigating circumstances the same weight the defendant does. Gross v. State, 769 N.E.2d 1136, 1140 (Ind.2002). Nor is the trial court obliged to accept the opinions of experts. Thompson v. State, 804 N.E.2d 1146, 1149 (Ind.2004). The trial court is required to accept as mitigating a circumstance that is established by the facts and as a matter of law is to be considered. Anglemyer v. State, 868 N.E.2d 482, 490-91 (Ind.2007), *reh'g granted,* 875 N.E.2d 218 (Ind.2007). But it is not reversible error to fail to consider a factor that is not significant in relation to all the circumstances of the case. Anglemyer, 875 N.E.2d at 220-21 (opinion on rehearing).

Here, the trial court was required to consider all evidence relevant to mitigation, which, as the Supreme Court held in Skipper, includes evidence of positive adjustment to incarceration. The jury heard this evidence and found that the aggravating circumstances outweighed the mitigating circumstances as a whole. After the jury was unable to reach a recommendation as to the sentence, the trial court independently evaluated the aggravating and

mitigating circumstances. With regard to the evidence that Wilkes adjusted well to incarceration, the court's sentencing order states:

> Defense counsel suggests that a mitigating circumstance is that the defendant can be safely incarcerated and punished within the Indiana Department of Corrections. The Court does not find that this is a mitigating circumstance.

We do not agree with Wilkes's contention that this language demonstrates that the trial court failed to consider Wilkes's adjustment to incarceration as a mitigating circumstance. The trial court used identical language in response to the claim that Wilkes had no significant history of prior criminal conduct, which has long been recognized as a potential mitigating circumstance. We take these as statements that the trial court weighed these proffered mitigating circumstances and determined that in this case neither was entitled to significant weight.

The court, like the jury, after hearing the proffered evidence, ultimately concluded that the aggravating circumstances outweighed the mitigating circumstances. Under Skipper, this is all that is required. The court also independently determined that the death sentence should be imposed after considering all of the aggravating and mitigating circumstances. Under the circumstances of this case-a triple murder including two children-we cannot say that the trial court abused its discretion.

C. Sydne's Age as an Aggravating Circumstance

Wilkes argues that his Sixth Amendment rights were violated because the fourth aggravating circumstance-that one of the victims was less than twelve years old-was not found beyond a reasonable doubt by a jury. Wilkes contends that the age of the victim was not an element of murder so that issue was never presented to the jury or returned in a verdict by proof beyond a reasonable doubt. But during the guilt phase of trial, the State presented undisputed evidence that Sydne was eight years old. At the penalty phase, the jury returned a verdict form finding that "the State of Indiana has proven beyond a reasonable doubt the charged aggravating circumstance that ... the victim of that murder, Sydne Claspell, was less than twelve (12) years of age." Evidence at the guilt phase may be considered at the penalty phase. I.C. § 35-50-2-9(d) ("The jury or the court may consider all the evidence introduced at the trial stage of the proceedings...."). The evidence of Sydne's age presented in the guilt phase was sufficient to support the jury's finding in the penalty phase as to this aggravating circumstance.

D. *Consideration of Other Criminal Acts*

Wilkes argues that the trial court erred in considering his molestation of Avery in determining whether to find Wilkes's lack of serious criminal history as a mitigating circumstance. In its sentencing order the trial court found

> that the defendant had no prior felony convictions. He did have five (5)

> misdemeanor convictions, four (4) of which were alcohol offenses. He was also charged with felony non-support in the Pike Circuit Court, which case was recently dismissed because of the defendant's convictions in this case. Finally, the defendant has admitted that, prior to the date of the murders herein, and on one or more occasions, he committed the crime of child molesting with regard to victim Avery Pike.

Wilkes contends that the corpus delicti rule precluded the trial court from considering his sexual activity with Avery because no evidence other than his confession was offered to establish the sexual activity.

As explained in Part II.A., supra, the corpus delicti rule serves to prevent conviction for crimes that never occurred. It does not prohibit consideration in sentencing of facts admitted by the defendant. Uncharged crimes may be considered in assessing "lack of criminal history" as a claimed mitigating circumstance. Rouster v. State, 600 N.E.2d 1342, 1348-49 (Ind.1992). Similarly, relevant evidence of another crime is admissible to rebut the defendant's claimed lack of criminal history even if that evidence may not be sufficient to support a conviction. The trial court did not err in considering Wilkes's admitted sexual activity with Avery to rebut Wilkes's claimed lack of criminal history.

E. The Jury's Failure to Recommend a Sentence

Wilkes argues that this Court should remand for resentencing because the trial court should have considered

as a mitigating factor the jury's inability to arrive at a unanimous sentencing recommendation. Wilkes notes that Indiana Code subsection 35-50-2-9(c)(8) permits the trial court to consider any other circumstances appropriate for consideration as mitigators. He contends that the jury's failure to recommend a sentence is a factor to be considered in mitigation. The State responds that subsection (f) implies that the jury's inability to recommend a sentence is irrelevant because in that case sentencing "shall proceed as if the hearing had been to the court alone."

This Court has previously divided over this issue. In Roche v. State, 596 N.E.2d 896 (Ind.1992), the jury was discharged after being unable to reach a recommendation, and the trial court imposed a sentence of death. This Court held that "[N]o meaning should be interpreted from the jury's failure to reach a recommendation. Likewise, the failure to reach a recommendation should not be considered as a mitigating factor during the penalty phase." Id. at 899. Justice DeBruler, joined by Justice Krahulik, dissented, reasoning that

> the quandary of the jury represents at least the sentiment of one conscientious juror, who survived voir dire, who heard the shocking evidence of sudden injury and death, who voted for conviction, and finally whose conscience could not support imposition of the death penalty. In my opinion, that sentiment cannot rationally be rejected as a mitigating circumstance as falling within the catch-all.... The weight of it is not great, falling I would say in the low range.

Id. at 902.

The view of the Roche majority was upheld in Burris v. State, 642 N.E.2d 961 (Ind.1994), despite Justice Sullivan's separate opinion, which agreed with Justice DeBruler's dissent in Roche. The Roche and Burris majority opinions were also upheld in Holmes v. State, 671 N.E.2d 841 (Ind.1996), where Justice DeBruler wrote for the majority:

> this court has twice held over vigorous dissent, including that of the author of this opinion, that a jury's inability to reach a recommendation need not be considered as a mitigating circumstance and has no effect upon subsequent court sentencing procedure.

Id. at 851. Finally, in Dunlop v. State, 724 N.E.2d 592, 600 (Ind.2000), Justice Sullivan's dissenting opinion, joined by Justice Rucker, mentioned the jury's inability to reach a unanimous recommendation as a mitigating circumstance in a life without parole case, but this issue was not addressed by the majority.

In this case, the trial court considered itself bound by Roche and concluded that it could not consider the jury's lack of recommendation in selecting a penalty. The trial court noted that subsequent statutory amendments and case law could be viewed as relevant to the issue, but appropriately left any change in the law to this Court.

We last visited this issue in 1996. In 2002, the General Assembly amended the death penalty statute to make the jury's sentencing recommendation binding on the

judge in most circumstances. I.C. § 35-50-2-9. We think this increased emphasis on the role of the jury provides a reason to reconsider the Roche line of cases. The lack of unanimity among the jurors does not bear on the defendant's conduct or any facts that tend to lessen his culpability. It does, however, demonstrate a level of uncertainty among the citizens who considered the evidence as to the appropriate penalty. It is therefore more properly considered a relevant consideration than a mitigating circumstance, but it is a factor the trial court should be permitted to consider in determining the appropriate sentence. We therefore reach the same result as the Roche and Burris dissenters and hold that it is "appropriate" for the trial court to consider the fact that the jury-whose recommendation would otherwise be binding-could not agree. We do not find the trial court's adherence to then-existing precedent to be error, much less reversible error. The trial court expressly stated its independent conclusion that the aggravating circumstances outweighed the mitigating circumstances and thus the death penalty was appropriate.

F. *Appellate Rule 7(B) Claim*

Article 7, Section 4 of the Indiana Constitution gives this Court power in all criminal appeals "to review and revise the sentence imposed." Indiana Appellate Rule 7(B) provides that this Court may revise a sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Wilkes requests this Court to consider all of his arguments and his individual characteristics and determine that his

death sentences are inappropriate.

Wilkes presented evidence regarding his character. As the trial court found, Wilkes has no prior felony convictions. However, he did admit to drug use and to molesting Avery on multiple occasions. Wilkes presented evidence of a terrible childhood, including neglect, physical abuse, sexual abuse, alcoholic parents, removal from the home, and time in institutions. Wilkes also presented evidence that he is addicted to several drugs and has suffered from longstanding depression since the age of eleven. Finally, Wilkes argues that he can be safely incarcerated and that his life has and will continue to show "redeeming qualities," such as helping others. We believe that these factors have some mitigating weight, as does the fact that the jury could not agree on a sentencing recommendation. As in all sentencing, however, we give considerable deference to the ruling of the trial court. We cannot say that the death sentences in this case are inappropriate. The nature of the offense is a triple murder of a mother and her two children. The murders, especially of Donna and Sydne, were committed in a particularly gruesome manner. We have upheld death sentences in similar cases. E.g., Ward v. State, 903 N.E.2d 946, 962-63 (Ind.2009) (upholding death sentence for "brutal and savage slaying" and rape of fifteen-year-old girl); Baer v. State, 866 N.E.2d 752, 766 (Ind.2007) (upholding death sentence for "brutal and savage slaying of a four-year old and her young mother").

Conclusion

Wilkes's convictions and death sentence are affirmed.

SHEPARD, C.J., and SULLIVAN and RUCKER, JJ. concur.
DICKSON, J., concurs in result with separate opinion.
DICKSON, Justice, concurring in result.

I concur except with respect to the Court's departure from Roche v. State, 596 N.E.2d 896 (Ind.1992), and its progeny. I continue to believe that a jury's inability to reach a unanimous sentencing recommendation is logically unrelated to the defendant's conduct or personal circumstances and thus is irrelevant as a consideration in determining the appropriate sentence for a defendant.

APPENDIX B

STATE OF INDIANA)
) SS:
COUNTY OF CLARK)

IN THE CLARK CIRCUIT COURT

CAUSE NO. 10C01-0705-MR-00158

STATE OF INDIANA)
)
VS.)
)
DANIEL RAY WILKES)

CHRONOLOGICAL CASE SUMMARY
OF AUGUST 29, 2007

STATE BY STANLEY LEVCO AND DONITA FARR; BARBAR WILLIAMS AND BILL DENTON APPEAR ON BEHALF OF THE DEFENDANT. DEFENDANT WAIVES HIS RIGHT TO BE PRESENT IN PERSON. CONFERENCE IS HELD IN THE GRAND JURY ROOM, ON THE RECORD. COURT NOW DENIES DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS. IF DEFENSE HAS ANY MOTIONS TO SUPPRESS OR REDACT FROM ANY OF THE DEFENDANT'S STATEMENTS MADE TO ANYONE WHICH STATES REASONS FOR SUPPRESSION OR REDACTION, OTHER THAN THE ONES ALREADY STATED IN THE DENIED MOTIONS, THEY ARE TO BE FILED ON OR BEFORE SEPTEMBER 14, 2007.

STATE IS ORDERED TO PREPARE AND SUBMIT TO OPPOSING COUNSEL, ANY PROPOSED TRANSRIPTS OR ANY STATEMENTS THEY PROPOSE TO INTRODUCE INTO EVIDENCE AT TRIAL ON OR BEFORE SEPTEMBER 14, 2007 . . .

APPENDIX C

STATE OF INDIANA)
) SS:
COUNTY OF CLARK)

IN THE CLARK CIRCUIT COURT

CAUSE NO. 10C01-0705-MR-00158

STATE OF INDIANA)
)
VS.)
)
DANIEL RAY WILKES)

SENTENCING ORDER

The defendant was tried by a jury before this Court commending with jury selection on December 4, 2007, and concluding the guilt phase on December 12, 2007. The jury found the defendant guilty of all three (3) counts of the charging information (Count I being the murder of Donna Claspell, Count II being the murder of Avery Pike, and Count III being the murder of Sydne Claspell). The same jury reconvened and evidence in support of aggravating circumstances and mitigating circumstances was heard. On December 14, 2007, the jury returned a unanimous finding that the four (4) aggravating circumstances alleged by the State of Indiana in the charging information were proved beyond a reasonable doubt. The jury also unanimously found that the aggravating circumstances outweighed the mitigating circumstances which were heard. Finally, the

jury was unable to reach a unanimous recommendation to whether the defendant should be sentenced to death, like imprisonment without parole, or a term of years. The Court rescheduled a sentencing hearing and final sentencing hearing for January 11, 2008, which on the defendant's motion was reset to this date, January 25, 2008.

A. AGGRAVTING CIRCUMSTANCES

With regard to aggravating circumstances, the jury unanimously found by their verdict after the guilt phase of the trial, that the first three aggravating circumstance set forth below were proved beyond a reasonable doubt. After the penalty phase of the trial, the jury unanimously found all four of the aggravating circumstances set forth below were proved beyond a reasonable doubt. In addition, the defense, during the penalty phase of the trial, conceded that all of the aggravating circumstances set forth below were proved beyond a reasonable doubt. Finally, the Court, having heard the evidence presented in both the guilt and the penalty phase, as well as argument from the attorneys, independently finds that all of the following aggravating circumstances were proved beyond a reasonable doubt.

1. The defendant, Daniel Wilkes, committed another murder other than the murder alleged in Count I of the information, to wit: the murder of Avery Pike and the murder of Sydne Claspell.

2. The defendant, Daniel Wilkes, committed another murder other than the murder alleged in Count II of the information, to wit: the murder of Donna Claspell and the murder of Sydne Claspell.

3. The defendant, Daniel Wilkes, committed another murder other than the murder alleged in Count III of the information, to wit: the murder of Donna Claspell and the murder of Avery Pike.

4. The defendant, Daniel Wilkes, committed the crime of murder as alleged in Count III of the information and the victim of that murder, Sydne Claspell, was less than twelve (12) years of age.

None of the other aggravating circumstances enumerated by statute are applicable to this case, and none other were considered by the Court. Nothing except as previously indicated in paragraphs 1, 2, 3, and 4, above, was considered in aggravation.

B. MITIGATING CIRCUMSTANCES

All of the statutory mitigating circumstances and other mitigating circumstances presented by the defense were reviewed and considered by the court, and the Court finds as follows with regard to those circumstances:

1. The defendant has no significant history of prior criminal conduct.

The Court finds that the defendant had no prior felonies. He did have five (5) misdemeanor convictions, four (4) of which were alcohol offenses. He was also charged with felony non-support in the Pike Circuit Court, which case was recently dismissed because of the defendant's convictions in this case. Finally, the defendant has admitted that, prior to the date of the murders herein, and on one or more occasions, he committed the crime of child molesting with regard to victim Avery Pike, age fourteen (14). The Court does not find that this is a mitigating circumstance.

2. The defendant was under the influence of extreme emotional disturbance when the murder was committed.

The Court finds that the defendant was suffering some mental and emotional disturbance when the murder was committed, including depression, alcohol and other substance dependence, mixed personality disorder, and psychological stressors. This is a mitigating circumstance which should be given some weight.

3. The victim was a participant in or consented to the defendant's conduct.

There is no evidence to support this mitigating circumstance. The victims were murdered in their beds, and were defenseless. The Court finds that this mitigating circumstance does not exist.

4. The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence to support this mitigating circumstance, and the Court finds that it does not exist.

5. The defendant acted under the substantial domination of another person.

There is no evidence to support this mitigating circumstance, and the Court finds that it does not exist.

6. The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication.

The Court finds that the defendant was apparently intoxicated prior to the time that the murders were committed, and that the defendant had the metal conditions recited above in paragraph 2. However, the court does not

find from the evidence that any of these conditions substantially impaired the defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of the law. Therefore, this is not a mitigating circumstance.

7. The defendant was less than eighteen (18) years at the time the murder was committed.

There is no evidence to support this mitigating circumstance, and the court finds that it does not exist.

8. Any other circumstances appropriate for consideration.

The evidence supports the finding that the defendant's developmental upbringing was unstable, abusive and neglectful. The Court finds that this is a mitigating circumstance which should be given some weight.

Defense counsel suggests that a mitigating circumstance is that the defendant can be safely incarcerated and punished within the Indiana Department of Corrections. The Court does not find that this is a mitigating circumstance.

The court finds no other mitigating circumstances.

The Court has considered the issue of whether the jury's inability to arrive at a unanimous decision with regard to the penalty in this case should be considered by the Court in deciding the defendant's sentence. In Roche v. State, 596 N.E.2d 896, 899 (Ind. 1992), the Indiana Supreme Court held that a jury's inability to reach a recommendation "should not be considered as a mitigating factor during the penalty phase" of a capital trial. In a concurring opinion in Roche, Justice DeBruler and Justice Krahulik disagreed, stating that a jury's indecision could be a mitigating circumstance because "the quandary of the

jury represents at least the sentiment of one conscientious juror, who survived voir dire, who heard the shocking evidence of sudden injury and death, who voted for conviction, and finally whose conscience could not support the imposition of the death penalty." This position was shared by Justice Sullivan in his concurring opinion in Burris v. State, 642 N.E.2d 961, 970 (Ind. 1994), wherein he states "that one or more members of the 'conscience of the community' assembled to review the propriety of the death penalty believes that it should not be imposed is, in my view, a circumstance appropriate for consideration . . . . . ." Justice Sullivan and Justice Rucker, while concurring and dissenting in Dunlop v. State, 724 N.E.2d 592, 598, 600 (Ind. 2000), found that the inability of a jury to make a unanimous recommendation should be a consideration in a case involving life imprisonment without parole.

It is possible that the rule stated in Roche could be revisited by the Indiana Supreme Court as a result of certain changes which have occurred with regard to standards and procedures in capital cases. The first of thee changes is the narrowing of the trial court's permitted considerations in determining an appropriate penalty, to the point where it is difficult to determine what standard is to be used. In Bivens v. State, 642 N.E.2d 928, 955 (Ind. 1994), the Supreme Court stated that the only aggravating circumstances eligible for consideration in a death penalty case are those specified in the death penalty statute and alleged by the State of Indiana in the charging information. The aggravating circumstances required to support a sentence of death are the same as those required to support a sentence of life imprisonment without parole. If those aggravating circumstances are proved, and are proved to

outweigh any mitigating circumstances, then a penalty of death or life imprisonment without parole is permitted. The issue then becomes how to choose between the two, or between those two and a term of years. Guidance on this issue is limited.

Secondly, Indiana's capital sentencing scheme was modified in 2002, when the legislature amended the applicable statute to provide that the jury's recommendation with regard to the penalty in capital cases is binding upon the Court, rather than advisory.

In view of both of these developments, it could be argued that the indecision of a jury on whether the death penalty should be imposed should be a consideration for the Court. However, notwithstanding such possible arguments to the contrary, the law in Indiana that presently exists is clearly stated in Roche, which provides that the inability of the jury to recommend a penalty in a capital case should not be considered by the Court. Therefore, this Court cannot and has not considered that fact in making its decision.

The issue that remains is the appropriate sentence in this case, considering the circumstances of the defendant, his background, and the crimes that he committed, which crimes were the murders of three (3) people, including an eight (8) year old child. After considering all of the factors, the Court concludes that the appropriate sentence for the defendant is the highest penalty provided by Indiana law for these crimes, that being the sentence of death. Consequently, for the defendant's murder of Donna Claspell under Count I, for the defendant's murder of Avery Pike under Count II, and for the defendant's murder of Sydne Claspell under Count III, the Court now sentences the defendant to death in the manner prescribed by law.

The court now sets January 25, 2009, as the initial date for execution of sentence.

The Court now remand s the defendant to the custody of the Indiana Department of Correction, which is ordered to hold the defendant in an appropriate facility. A copy of this Sentencing Order shall be forwarded to the Indiana Supreme Court Administrator's Office, the Vanderburgh County Prosecuting Attorney, the defendant, the defendant's attorney of record, the defendant's appellate counsel, the Indiana Attorney General, the Commissioner of the Indiana Department of Correction, the warden of the Indiana Department of Correction institution where the defendant is to be confined, and the Indiana State Public Defender. The Clerk of this Court is ordered to forward a copy of this order to the Indiana Supreme Court Administrator's office with a certification by the Clerk that the parties listed herein were severed a copy of the same.

The court reporter and Clerk are hereby authorized to begin preparation of the record on appeal.

This case is being subject to automatic appeal, and the Court having found the defendant is financially unable to employ an attorney, the Court now appoints John Goodridge as defendant's appellant counsel, finding that said attorney is qualified as appellate counsel in a capital case pursuant to Rule 24(J) of the Indiana Rules of Criminal Procedure.

SO ORDERED, ADJUDGE AND DECREED this 25th day of January, 2008.

Carl A. Heldt

Carl A. Heldt, Special Judge
Clark Circuit Court

APPENDIX D

STATE OF INDIANA)
) SS:
COUNTY OF CLARK)

IN THE CLARK CIRCUIT COURT
CAUSE NO. 10C01-0705-MR-00158

STATE OF INDIANA)
)
VS.)
)
DANIEL RAY WILKES)

CHRONOLOGICAL CASE SUMMARY
OF MARCH 18, 2008

STATE BY PROSECTOR, STAN LEVCO AND DPA Donita Farr. John Goodridge and William Gooden for Defendant. Oral Argument held on Defendant's Motion to Correct Errors. Court denies motion. (Minuet Entry sent from Vanderburgh Circuit Court.)

APPENDIX E

Indiana Supreme Court

S.Ct. No. 10S00-0808-DP-453

Daniel Ray WILKES,	)
Appellant,	)
v.	)
	)
State of INDIANA,	)
Appellee.	)

ORDER DENYING REHEARING IN CAPITAL CASE

Wilke's murder conviction and death sentence were affirmed on direct appeal in Wilkes v. State, 917 N.E.2d 675 (Ind.2009), and today, the Court denies Wilkes' rehearing petition. Accordingly, the Court will set an execution date in a separate order unless, within thirty days from the date of this order, counsel has entered an appearance in the trial court, advised the trial court of the intent to petition for post-conviction relief, and requested this Court for a stay of execution all in accordance with Criminal Rule 24(H)

The Clerk is directed to send copies of this order to the Clark Circuit Court, the Vanderburgh County Prosecuting Attorney; the Attorney General of Indiana; the Public Defender of Indiana; the Public Defender Council (Paula Sites); the Prosecuting Attorney's Council; and all counsel of record.

Done at Indianapolis, Indiana this 16th day of March, 2010.

/s/
Randall T. Shepard
Chief Justice of Indiana

All Justices concur.

Respectfully submitted,

JOHN GOODRIDGE, ESQ.
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Evansville, Indiana 47708
Tel. 812-426-0482

Counsel for Petitioner

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(3)

No. 09-1539

Supreme Court, U.S.
FILED
SEP 17 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DANIEL RAY WILKES,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Should the Court reconsider *Berghuis v. Thompson*, 130 S. Ct. 2250, 2259-60 (2010), and decide that a suspect may cause questioning to cease by ambiguously asserting his right to silence during a custodial interrogation?

II. Should the Court reconsider *Kansas v. Marsh*, 548 U.S. 163, 173 (2006), and find a Constitutional requirement that the prosecution must prove beyond a reasonable doubt to a jury that the aggravating circumstances outweigh the mitigating circumstances before a defendant may be sentenced to death?

III. Should the Court reconsider *Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990), and prohibit the practice of "appellate reweighing" by state appellate courts to cure errors in a capital sentence?

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RESPONDENT'S BRIEF IN OPPOSITION

The State of Indiana respectfully opposes Wilkes's petition seeking certiorari review of his convictions for triple murder and resulting sentences of death.

STATEMENT

Wilkes stands convicted and sentenced to death for the murder of Donna Claspell and her two young daughters, Sydne and Avery. The Indiana Supreme Court summarized the evidence underlying these crimes:

> In the spring of 2006, Daniel Wilkes met Donna Claspell and Michael Baker while all three were being treated at a drug rehabilitation center. After discharge, Wilkes stayed with Donna and her two daughters, eight-year-old Sydne Claspell and thirteen-year-old Avery Pike. Wilkes told Baker that one night he awoke to find Avery "hunching on his leg," and that he and Avery then engaged in mutual oral sex. Wilkes later admitted to molesting Avery on a total of three or four occasions. On the evening of April 23 or the early morning of April 24, Donna found Wilkes and Avery together and told Wilkes that he would have to leave the home.
>
> Around eight o'clock the next morning, Donna's neighbors observed Baker picking up Wilkes at the home, and one heard Wilkes say something like, "I've got to get out of here." That night, according to Baker, Wilkes kept looking

> out the windows and expressed concern that the police would come for him.
>
> On April 26, the bodies of Donna, Sydne, and Avery were found in their home. Donna and Sydne were in the master bedroom. Donna had sustained multiple injuries, including a deep cut wound to the neck and blows to the head from a hammer and another blunt instrument. A knife was found under Donna's shoulder. Sydne had died from at least twenty-seven blows to the head, back, and shoulders from a hammer head and claw. Avery was found in her bedroom naked and face down on the bed. Her hands were bound behind her back with a cord, her ankle was tied to the bedpost, and she had been strangled with a piece of clothing.
>
> DNA and serological tests were performed on several items from Donna's home and also on clothing Wilkes was wearing at the time of his arrest. Donna's blood was found on the ball and claw of a hammer and on a level found at the home, and also on a shirt and hat worn by Wilkes. Sydne's blood was found on the claw of the hammer and on Wilkes's shirt and her DNA was found on Wilkes's shoe. Wilkes confessed to the murders[.]

Pet. App. 3-4.

A jury found Wilkes guilty of three counts of murder. The State requested that the death penalty be imposed, but the jury was unable to reach a unanimous recommendation as to the appropriate sentence. Following Indiana law applicable at the time, the trial court declined to consider the jury's

inability to agree unanimously on the sentencing recommendation as a relevant factor in determining whether Wilkes should receive the death penalty. The trial court imposed the death penalty.

Wilkes appealed to the Indiana Supreme Court. He raised numerous arguments, three of which are relevant to his petition. First, Wilkes argued that he invoked his right to silence when being interrogated by police and therefore some of his inculpatory statements should have been suppressed. Second, Wilkes argued that the federal Constitution requires that the prosecution prove to the jury beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Third, Wilkes argued that the trial court should have considered the jury's inability to reach a unanimous sentencing recommendation before sentencing him to death.

The Indiana Supreme Court affirmed Wilkes's convictions and sentences on December 10, 2009. Pet. App. 2-35. The court first found that Wilkes did not assert unambiguously his right to silence during questioning by police and so therefore the trial court properly admitted subsequent portions of Wilkes's inculpatory statements. Pet. App. 10-11. Second, the court reaffirmed its view that the weighing of aggravating and mitigating circumstances is not a functional equivalent to an element and therefore need not be proven beyond a reasonable doubt. Pet. App. 24-25. The court also held that in light of recent developments in Indiana law, trial courts should now consider a jury's inability to reach a unanimous sentencing recommendation when

determining the appropriate sentence for a capitally charged defendant. Pet. App. 31-34. Furthermore, the court independently reweighed the aggravating and mitigating evidence, including the jury's non-recommendation, and nonetheless determined that Wilkes should be sentenced to death. Pet. App. 34-35. The Indiana Supreme Court denied Wilkes's petition for rehearing on March 16, 2010. Pet. App. 48-49.

REASONS TO DENY THE PETITION

I. The Court should not revisit the question whether equivocal or ambiguous assertions of the right to silence require police to cease questioning a suspect

Just last term, the Court explained that in order to end an interrogation by invoking the Sixth Amendment right to silence, suspects must unequivocally assert the right. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259-60 (2010). It expressly declined to require police to guess about a suspect's intent in the face of ambiguous assertions of silence, *id.* at 2260, yet Wilkes invites the Court to do just that mere months later. Wilkes offers no split of authority among the circuits or States, nor is Respondent aware of any. The Indiana Supreme Court correctly found that Wilkes did not unambiguously assert his right to silence (Pet App. 10-11), and Wilkes concedes the question here. Pet. 18. There is no reason for the Court to revisit *Berghuis*.

II. The Constitution does not require the weighing of aggravating and mitigating circumstances to be done "beyond a reasonable doubt"

The Indiana Supreme Court properly rejected Wilkes's argument that the weighing of aggravating and mitigating circumstances is subject to proof beyond a reasonable doubt pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). It is constitutional for a state to impose the death penalty when the aggravating and mitigating circumstances are in equipoise, or even place the burden on a defendant to prove mitigating circumstances outweigh aggravating ones. *Kansas v. Marsh*, 548 U.S. 163, 173 (2006) (weighing in equipoise); *Walton v. Arizona*, 497 U.S. 639, 650 (1989) (placing burden on defendant), *overruled on other grounds by Ring*, 536 U.S. 584. Wilkes's argument that the Constitution requires prosecutors to prove that aggravators outweigh mitigators beyond a reasonable doubt is incompatible with *Marsh* and *Walton*. *Accord Kubsch v. State*, 866 N.E.2d 726, 739 (Ind. 2007), *reh'g denied, cert. denied.*

Wilkes points to no split of authority on this issue or otherwise explains how this issue is of extraordinary importance warranting plenary review.

III. Appellate reweighing is an appropriate tool to cure error in capital sentencing

The Eighth Amendment permitted the Indiana Supreme Court to conduct appellate reweighing in

order to correct any error in the trial court's refusal to consider the jury's inability to reach a unanimous sentencing recommendation, as this Court has squarely held. *Clemons v. Mississippi*, 494 U.S. 738, 748-50 (1990) (appellate reweighing of aggravating and mitigating circumstances is constitutionally permissible to cure errors in capital sentencing process). The Indiana Supreme Court accepted this Court's invitation and reweighed for itself all of the aggravating and mitigating evidence—including the fact that the jury did not reach a unanimous recommendation before independently concluding Wilkes should be sentenced to death. Pet. App. 34-35. His Eighth Amendment right to be free from an arbitrary and capricious sentence is intact.

Wilkes offers no reason to reconsider *Clemons*, fails to identify any confusion among the States on how appellate reweighing should be utilized, or otherwise offer any persuasive justification for granting review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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